WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

WILLIAM JONES, ***Applicant***

vs.

ROBBJACK CORPORATION; TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA, ***Defendants***

Adjudication Number: ADJ10110509
Sacramento District Office

OPINION AND DECISION AFTER RECONSIDERATION

The Appeals Board granted reconsideration to study the factual and legal issues. This is our Decision After Reconsideration.[1]

In the Findings and Award of February 4, 2021, the workers' compensation judge ("WCJ") found that applicant, while employed as a tool grinder by RobbJack Corporation during a period of cumulative trauma ending August 17, 2015, sustained injury arising out of and in the course of employment to his bilateral shoulders, left hand, neck, and low back, causing permanent disability indemnity of 47% after apportionment.

Applicant filed a timely Petition for Reconsideration of the WCJ's decision. Applicant alleges that the WCJ erred relying upon the medical opinion of Dr. Anderson, which is not substantial evidence of apportionment.

Defendant filed an answer.

The WCJ submitted a Report and Recommendation ("Report").

Based on our review of the record and applicable law, we find merit in applicant's contention that Dr. Anderson's opinion on apportionment is not substantial evidence. We will amend the Findings and Award of February 4, 2021 to issue an award of 71% permanent disability, without apportionment.

---

[1] Commissioner Deidra E. Lowe signed the Opinion and Order Granting Petition for Reconsideration dated April 6, 2021. As Commissioner Lowe is no longer a member of the Appeals Board, a new panel member has been substituted in her place.

FACTUAL BACKGROUND

There is no dispute that applicant sustained industrial injury by way of cumulative trauma through August 17, 2015, to his bilateral shoulders, left hand, neck and low back, and that the injury resulted in permanent disability in each of those body parts. Dr. Anderson, a specialist in neurology and pain medicine, served as the Panel Qualified Medical Evaluator ("PQME"). Dr. Anderson issued five narrative reports, and the doctor was deposed on one occasion. (Joint exhibits AA-FF.) The parties disputed the nature and extent of permanent disability, as well as the issues of apportionment and attorney's fees. These issues were tried before the WCJ on December 7, 2020. (Minutes of Trial Hearing, 12/7/20, p. 2.)

In her Opinion on Decision of February 4, 2021, the WCJ stated that based upon the PQME reports and deposition testimony of Dr. Anderson, the record supported a finding that applicant sustained permanent disability of 47%. The WCJ provided the following rating, with the bolded decimal figures representing Dr. Anderson's apportionment percentages:

> Cervical spine **.45** (15.01.01.00 - 18 [1.4] 25 - 320F - 25 - 28) 13
> Lumbar spine **.36** (15.03.01.00 - 8 [1.4] 11 - 320F - 11 - 13) 5
> Left shoulder **.5** (16.02.02.00 - 11 [1.4] 15 - 320H - 19 - 22) 11
> Right shoulder **.9** (16.02.02.00 - 11 [1.4] 15 - 320H - 19 - 22) 20
> Left hand **.4** (16.05.03.00 - 13 [1.4] 18 - 320H - 22 - 25) 10
>
> Combined values chart ("CVC"): 11 c 10 = 20 c 20 c 13 c 5 = 47%

In making the general statement that "the record supports a finding that applicant sustained permanent disability of 47%," it appears the WCJ relied on the parts of Dr. Anderson's reports set forth below, including the doctor's opinion on apportionment.

In a narrative report dated January 8, 2020,[2] Dr. Anderson summarized his opinion on apportionment at the end of his report, as follows:

> This is a complex matter. The applicant was previously evaluated and found permanent and stationary. At that time, all body parts were found permanent and stationary including the cervical spine, but with the caveat that the applicant might undergo surgery. If he did, then he would not be permanent and stationary for the cervical spine.

---

[2] We take Dr. Anderson's report of January 8, 2020 to be his final word on the issue of apportionment. This is because in his deposition of February 22, 2017, Dr. Anderson repeatedly changed his mind and gave confusing testimony about the nature and extent of applicant's cervical spine disability and apportionment. (Joint exhibit FF, pp. 9-30.) Similarly, the doctor requested clarification on the "January 2014 event" in reference to applicant's lumbar spine disability (*Id*., p. 36); the doctor was uncertain about the nature and extent of applicant's left shoulder disability (*Id*., p. 46); and the doctor testified that applicant's right shoulder and spine were not yet permanent and stationary. (*Id*., p. 54.)

Therefore, the reader can take the January 25, 2018 report and consider it a final report in this matter.

However, today, things are different. As would be expected, when two years go by, there is likely to be a change in person's medical condition. The applicant has had progression of carpal tunnel syndrome bilaterally, and this would likely be on the basis of diabetes or other nonindustrial factors. This is because carpal tunnel syndrome should remain static or improve if there is not ongoing injurious exposure. The fact that it is progressing absent injurious exposure suggests now to a medical probability, that nonindustrial factors are primarily responsible for increasing residual disability, and apportionment dramatically changes.

The applicant has cervical radiculopathy evidenced by new EMG studies. This was not present in 2017, and therefore, the new radiculopathy that has developed after injurious exposure, on a nonindustrial basis, requires a change in whole person impairment for the cervical spine and obviously a change in apportionment. The EMG study of 2018 indicates an acute and subacute radiculopathy, and this posits that the onset was approximately one year prior to that EMG, which is consistent with the idea that in 2017, the EMG did not demonstrate cervical radiculopathy. The development of cervical radiculopathy is evidence of ongoing degeneration of a nonindustrial nature after the timeframe of injurious exposure has ended.

However, the right shoulder, left shoulder, and lumbar spine really have not changed. As such, there is really nothing different about those body parts in this report.

The undersigned is left with the idea then that the January 25, 2018 report and its impairment ratings are considered medically accurate and substantial medical evidence at the time they were offered. Since that time, the applicant has had a change in his medical status, and that change, although influenced by the original industrial cumulative trauma, is primarily nonindustrial in nature, and therefore there are changes in apportionment and rating.

The parties involved may wish to use the January 25, 2018 report to better reflect the components related to industrial exposure. However, if it is more appropriate on a legal basis that the parties involved use the current status, there are changes in regard to carpal tunnel syndrome and the cervical spine to reflect the nonindustrial progression.

(Joint Exhibit EE, pp. 67-68.)

Thus, Dr. Anderson explained that the nature and extent of applicant's bilateral shoulder disability and his low back disability had not changed since the time of the doctor's prior report of

January 25, 2018. At that time, Dr. Anderson's opinion on apportionment of the disability caused by applicant's bilateral shoulder and low back injuries was as follows:

> Apportionment of permanent disability is considered in terms of the subject injury, prior injury, degenerative change, and other factors such as medical conditions.
>
> Body part 1: Left shoulder
>
> The undersigned has received no information that would change apportionment for the left shoulder. It remains 50% to degenerative change and 50% to cumulative trauma. This body part has had some improvement as a result of surgical intervention.
>
> […]
>
> Body part 4: Lumbar spine
>
> As with the cervical spine, the lumbar spine was clarified at the time of the deposition.[[3]] One of the issues at hand was that the original apportionment included an unusual event that occurred in January 2014 that at the time was believed to be nonindustrial, but later was found to be industrial, based on representations of what was going on at that time. Therefore, apportionment was altered to reflect the reality of the situation. The basis for this was outlined previously in the deposition and in the reevaluation performed in mid-2017 and the basis and opinion remain unchanged.
>
> - Degenerative changes 40%
> - Morbid obesity 19%
> - Cumulative trauma 36%
> - Bilateral foot problems 5%
>
> Body part 5: Right shoulder
>
> Unlike the left shoulder, the right shoulder did not have significant degenerative change, suggesting that a cumulative trauma played a greater role in resulting disability than the degenerative change, and upon consideration of the facts involved, the apportionment remains the same.
>
> - Cumulative trauma: 90%
> - Degenerative changes: 10%
>
> (Joint Exhibit DD, pp. 31-32.)

[3] We disagree. See footnote 2 above.

Returning to Dr. Anderson's narrative report dated January 8, 2020, the doctor offered the following opinion on apportionment of applicant's cervical spine disability:

> It is noted in the previous report that apportionment involved a childhood injury, whiplash as a young adult, degenerative change, the cumulative trauma in the workplace, and a specific twisting of the neck in late 2014.
>
> Unfortunately, there now is an additional confounder in that the applicant now appears to have acute and subacute radiculopathy associated with the cervical spine, based on a September 2018 EMG, not present as of the year 2017, and therefore representative of further nonindustrial degenerative change after the period of injurious exposure.
>
> Because the cervical spine whole person impairment will change based on the post injurious exposure change in the cervical spine status, occurring after the year 2017 but before the year 2019, based on the EMG study, the additional whole person impairment appears primarily not due to injurious exposure in the workplace.
>
> Therefore, there is an increase in the degree to which there would be nonindustrial degenerative change.
>
> Otherwise, there would not have been a change from what was discussed time of the deposition and placed in the January 25, 2018 report. But, based on today's rating for the cervical spine, which would be different, there would need to be a change in apportionment. If the parties involved wish to stick with the previous rating and apportionment reflective of that industrial injury as opposed to the present state, the undersigned does not have a disagreement. Otherwise, today, the applicant would have increased the degenerative change, and the degenerative change component would significantly increase because of the significant resulting impairment increase. Nonindustrial changes then would go from 10% to 20% whole person impairment to reflect how after injurious exposure and with no subsequent injury, the applicant has had significant progression of wear and tear at the cervical spine resulting in a significant increase in whole person impairment.
>
> APPORTIONMENT CONCLUSION
>
> Childhood injury 25%
>
> Whiplash as young adult 10%
>
> Nonindustrial 20%
>
> Cumulative trauma 30%
>
> Twisting of the neck in 2014 15%
>
> (Joint Exhibit EE, pp. 50-51.)

In the same report (January 8, 2020), Dr. Anderson offered the following opinion on apportionment of applicant's left-hand disability:

> At the time of the January 2018 report, it was noted that the applicant had an apportionment that took into account 70% cumulative trauma and 30% nonindustrial factors. At that time, the applicant developed a moderate carpal tunnel syndrome and of course underwent surgery. There was residual carpal tunnel syndrome evidenced by EMG.
>
> Today, however, it is found that after 2017 and by September 2018, the applicant had a progression of carpal tunnel syndrome and the progression of carpal tunnel syndrome would be based on factors other than injurious exposure at work. It should be clarified the carpal tunnel syndrome should not worsen once the injurious exposure is removed. As such, the worsening of the carpal tunnel syndrome would not be based on industrial factors, and therefore apportionment must now reflect that the residual disability and the worsening of the condition is based on factors other than the workplace. The applicant has diabetes, and diabetes is well-recognized in regard to carpal tunnel syndrome, for example. However, it is not known exactly what nonindustrial factors are present, but now, with a progression of the condition from moderate to moderately severe, there is now ongoing residual disability based primarily on factors that do not relate to employment.
>
> Thus, the active progression of the condition now appears primarily mediated by nonindustrial factors which likely includes diabetes.
>
> The new apportionment for the left wrist now would be 40% cumulative trauma and 60% nonindustrial factors. This is a significant difference, and the undersigned would note that again it appears more accurate to use the previous conclusion of January 25, 2018, before the applicant had a significant change in his medical condition with a significant change in residual disability occurring on the basis of nonindustrial factors.
>
> <u>APPORTIONMENT CONCLUSION</u>
>
> 40% cumulative trauma
> 60% nonindustrial
>
> (Joint Exhibit EE, pp. 57-58.)

DISCUSSION

Defendant has the burden of proof on apportionment. (*Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099, 1114 [71 Cal.Comp.Cases 1229].)

In *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 [Appeals Board en banc], the Board discussed the following requirements for a medical opinion to be considered substantial evidence of apportionment:

> "[I]n the context of apportionment determinations, the medical opinion must disclose familiarity with the concepts of apportionment, describe in detail the exact nature of the apportionable disability, and set forth the basis for the opinion, so that the Board can determine whether the physician is properly apportioning under correct legal principles. (*Ashley v. Workers' Comp. Appeals Bd.*, *supra*, 37 Cal.App.4th at pp. 326-327; *King v. Workers' Comp. Appeals Bd.*, *supra*, 231 Cal.App.3d at pp. 1646-1647; *Ditler v. Workers' Comp. Appeals Bd.*, *supra*, 131 Cal.App.3d at pp. 812-813.)
>
> Thus, to be substantial evidence on the issue of the approximate percentages of permanent disability due to the direct results of the injury and the approximate percentage of permanent disability due to other factors, a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions."
>
> (*Escobedo*, *supra,* 70 Cal.Comp.Cases at 621.)

In this case, defendant relies upon Dr. Anderson's opinion on apportionment to meet the burden of proof. However, we are not persuaded that the doctor's opinion is substantial evidence of apportionment per the requirements of *Escobedo*.

Dr. Anderson apportioned applicant's bilateral shoulder disabilities to "degenerative change," finding 50% of the left shoulder disability nonindustrial due to degenerative change and 10% of the right shoulder disability nonindustrial due to degenerative change. In neither instance, however, did Dr. Anderson describe in detail the exact nature of the apportionable disability or provide reasoning in support of his conclusions. The mere presence of degenerative change in the shoulders, in and of itself, does not mean that the degenerative change was causing definable permanent disability at the time of Dr. Anderson's evaluations of the applicant. Further, the doctor's identification of degenerative change in the shoulders is only a conclusion, unsupported by reasoning of how and why the degenerative change was causing disability when Dr. Anderson examined the applicant.

We find the same deficiencies in Dr. Anderson's apportionment of applicant's lumbar spine disability to the nonindustrial conditions of degenerative change (40%), morbid obesity (19%), and "bilateral foot problems" (5%). We already discussed above that the mere presence of degenerative change in a body part – here the lumbar spine – is not substantial evidence that the degenerative change is causing definable permanent disability. The same is true of morbid obesity and the vague diagnosis of "bilateral foot problems." Again, Dr. Anderson did not describe in detail the exact nature of the apportionable disability or provide reasoning in support of his conclusions for apportioning disability to degenerative change, morbid obesity, or bilateral foot problems.

Dr. Anderson also offered an opinion on apportionment of applicant's cervical spine disability in his report dated January 8, 2020. However, we conclude that the doctor's opinion is not substantial evidence because it is internally contradictory and speculative. Dr. Anderson opined that applicant's cervical spine disability is subject to nonindustrial apportionment of 25% due to a childhood injury, 10% due to "whiplash as young adult," 20% due to "nonindustrial" [sic], and 15% to a "twisting of the neck in 2014."

In reference to Dr. Anderson's nonindustrial apportionment based on a childhood injury, whiplash as young adult, and "twisting of the neck in 2014," the doctor did not describe in detail the exact nature of the apportionable disability or provide reasoning in support of his conclusions. Further, Dr. Anderson failed to explain how and why applicant's childhood injury, his whiplash as young adult, and the twisting of his neck in 2014, were causing disability when the doctor examined the applicant.

In his January 8, 2020 report, Dr. Anderson also increased the general "nonindustrial" apportionment of applicant's cervical spine disability from 10% to 20%. The doctor stated that "applicant now appears to have acute and subacute radiculopathy associated with the cervical spine, based on a September 2018 EMG, not present as of the year 2017, and therefore representative of further nonindustrial degenerative change after the period of injurious exposure." Dr. Anderson also stated that "[b]ecause the cervical spine whole person impairment will change based on the post-injurious exposure change in the cervical spine status, occurring after the year 2017 but before the year 2019, based on the EMG study, the additional whole person impairment appears primarily not due to injurious exposure in the workplace," and that "[t]herefore, there is

an increase in the degree to which there would be nonindustrial degenerative change." Dr. Anderson then concluded:

> Otherwise, there would not have been a change from what was discussed time of the deposition and placed in the January 25, 2018 report. But, based on today's rating for the cervical spine, which would be different, there would need to be a change in apportionment. If the parties involved wish to stick with the previous rating and apportionment reflective of that industrial injury as opposed to the present state, the undersigned does not have a disagreement. Otherwise, today, the applicant would have increased the degenerative change, and the degenerative change component would significantly increase because of the significant resulting impairment increase. Nonindustrial changes then would go from 10% to 20% whole person impairment to reflect how after injurious exposure and with no subsequent injury, the applicant has had significant progression of wear and tear at the cervical spine resulting in a significant increase in whole person impairment.
>
> (Joint Exhibit EE, p. 51.)

In apportioning applicant's cervical spine disability to "increased degenerative change" as set forth above, Dr. Anderson provided some reasoning for his opinion, but the reasoning is faulty. In stating that applicant's acute and subacute radiculopathy associated with the cervical spine, based on a September 2018 EMG and not present as of the year 2017, is "therefore representative of further nonindustrial degenerative change after the period of injurious exposure," Dr. Anderson assumes without explanation that the acute and subacute cervical spine radiculopathy that developed between 2017 and 2018 is entirely unrelated to the cumulative trauma that ended August 17, 2015. However, since Dr. Anderson indicated that applicant suffered no new neck injury after the industrial cumulative trauma, it does not necessarily follow that the "significant progression of wear and tear at the cervical spine" that occurred between 2017 and 2018 is not a progressive worsening sourced in the cumulative trauma that ended August 17, 2015. Further, Dr. Anderson contradicted himself, in increasing nonindustrial apportionment from 10% to 20% based on degenerative change in the cervical spine, when the doctor stated that he did not disagree if the parties "[stuck] with the previous rating and apportionment reflective of that industrial injury as opposed to the present state[.]" With Dr. Anderson ultimately willing to shrug off his changed opinion on apportionment for the convenience of the parties, we conclude that his opinion on nonindustrial apportionment of applicant's cervical spine disability is speculative and cannot be accepted as substantial evidence as defined in *Escobedo.*

Turning to Dr. Anderson's apportionment of applicant's left-hand disability, the doctor previously apportioned 30% of the disability to nonindustrial obesity,[4] but he noted in his January 8, 2020 report that after 2017 and by September 2018, applicant's carpal tunnel syndrome had progressed. Dr. Anderson now opined that because carpal tunnel syndrome should not worsen absent injurious exposure, the residual disability and the worsening of the condition would be due to factors other than the workplace, specifically applicant's nonindustrial diabetes. Dr. Anderson therefore doubled his previous nonindustrial apportionment from 30% to 60%; the doctor opined that only 40% of applicant's left-hand disability should be considered industrial.

As with the other aspects of Dr. Anderson's apportionment opinion discussed above, we conclude that his apportionment of applicant's left-hand disability is not substantial evidence. In addition to the lack of an explanation for specifying the 60% nonindustrial apportionment figure, Dr. Anderson conceded that apportionment of applicant's left-hand disability to nonindustrial diabetes was based on speculation, stating in his January 8, 2020 report: "However, *it is not known exactly what nonindustrial factors are present*, but, now, with a progression of the condition from moderate to moderately severe, there is now ongoing residual disability based primarily on factors that do not relate to employment." Since Dr. Anderson did not know "what nonindustrial factors are present," his opinion that applicant's left-hand disability is due 60% to nonindustrial "other factors" under Labor Code section 4663 is unfounded.

Further, Dr. Anderson, in his January 8, 2020 report seemed to doubt his own opinion, stating that he "would note that again *it appears more accurate* to use the [doctor's] previous conclusion of January 25, 2018, before the applicant had a significant change in his medical condition with a significant change in residual disability [allegedly] occurring on the basis of nonindustrial factors." We reject Dr. Anderson's apportionment opinion concerning applicant's left-hand disability because it does not meet *Escobedo's* requirements that a reporting physician's opinion must not be speculative, it must be based on pertinent facts, and it must set forth reasoning in support of its conclusions.

---

[4] Exhibit AA, Anderson report dated April 18, 2016, p. 46. Dr. Anderson states that obesity increases the likelihood that a person may develop carpal tunnel syndrome, while it decreases the potential for recovery from disability that may result from carpal tunnel syndrome. In his January 25, 2018 report, Dr. Anderson added diabetes as another nonindustrial causative factor in applicant's left-hand disability. (Exhibit DD, p. 31.) Contrary to *Escobedo's* requirements, Dr. Anderson failed to describe in detail the exact nature of the disability he apportioned to obesity and/or diabetes, and the doctor failed to give reasons why he chose 30% as the percentage of causation that obesity and/or diabetes is contributing to applicant's left-hand disability.

We concluded above that Dr. Anderson's apportionment of applicant's bilateral shoulder disabilities, cervical and lumbar spine disabilities, and left-hand disability is invalid. We note that other than contesting apportionment, applicant's petition for reconsideration does not object to the WCJ's permanent disability rating. Accordingly, we follow the rating formula applied by the WCJ in her Opinion on Decision, but without apportionment:

Cervical spine: 15.01.01.00 - 18 [1.4] 25 - 320F - 25 - 28
Lumbar spine: 15.03.01.00 - 8 [1.4] 11 - 320F - 11 - 13
Left shoulder: 16.02.02.00 - 11 [1.4] 15 - 320H - 19 - 22
Right shoulder: 16.02.02.00 - 11 [1.4] 15 - 320H - 19 - 22
Left hand: 16.05.03.00 - 13 [1.4] 18 - 320H - 22 - 25

CVC: 28 C 25 = 46 C 22 = 58 C 22 = 67 C 13 = 71%

Thus we find applicant entitled to an award of 71 percent permanent partial disability, which will include a life pension. Though we agree with the WCJ that applicant's attorney should be allowed a reasonable fee of 15% of the value of the award, the value will include permanent partial disability indemnity as well as the life pension. It will be appropriate for the parties and the WCJ to consider a "horizontal" commutation of the life pension in order to account for the attorney's fee. (*Navarro v. McClarty Farms & State Compensation Ins. Fund* (2015) 2015 Cal. Wrk. Comp. P.D. LEXIS 537.) Therefore, the award will be subject to adjustment pending further proceedings on the attorney's fee, with assistance from the Disability Evaluation Unit as necessary or appropriate.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Award of February 4, 2021 is **AFFIRMED**, except that Finding 2 and Paragraph 1 of the Award are **AMENDED** in the following particulars:

FINDINGS OF FACT

2. The industrial injury described in Finding 1(a.) resulted in permanent partial disability of 71%.

AWARD

1. Permanent disability of 71%, indemnity for which is payable for 449.25 weeks at $290.00 per week until the total sum of $130,282.50 is paid, followed by a life pension of $85.04 per week subject to Cost of Living Adjustments pursuant to *Baker v. Workers' Comp. Appeals Bd.* (2011) 52 Cal.4th 434 [76 Cal.Comp.Cases 71], less credit for any permanent disability advances paid by defendant and less a reasonable attorney's fee equivalent to 15% of the value of the permanent disability award payable to Smolich and Smolich, with the award subject to adjustment to satisfy the attorney's fee, the dollar amount of which shall be determined by the WCJ with assistance from the Disability Evaluation Unit as necessary or appropriate, jurisdiction reserved.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 27, 2024

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

WILLIAM JONES
LAURA G. CHAPMAN & ASSOCIATES
SMOLICH & SMOLICH

JTL/*ara*

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date. *abs*